

**State of Michigan**  
**In The**  
**Supreme Court**

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APPEAL FROM THE MICHIGAN COURT OF APPEALS  
Owens, P.J. and Jansen and R.B. Burns, JJ.

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

Docket No. 118021

ERIC D. BOYD,

Defendant-Appellant.

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Court of Appeals No: 214097  
Wayne County Circuit Court: 97-05161

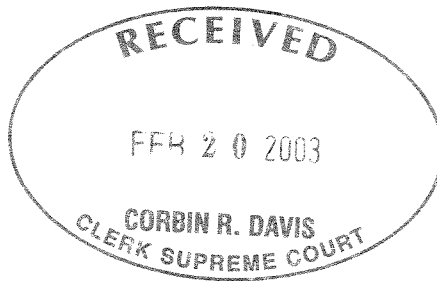
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**DEFENDANT-APPELLANT'S BRIEF ON APPEAL**

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**ORAL ARGUMENT REQUESTED**

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## **JURISDICTIONAL STATEMENT**

The Supreme Court has jurisdiction over Defendant/Appellant ERIC BOYD's delayed application for leave to appeal pursuant to MCR 7.301(A)(2). The Court of Appeals issued an unpublished opinion September 15, 2000, affirming Defendant/Appellant's conviction (Appendix 7.A.). Defendant/Appellant filed a delayed application for leave to appeal in the Supreme Court on November 2, 2000, within fifty six (56) days of the Court of Appeals' decision pursuant to MCR 7.302(C)(3). On June 12, 2001, the Supreme Court held Defendant/Appellant's delayed application for leave to appeal in abeyance pending resolution of People v Dennis, 464 Mich. 567; 628 NW 2d 502 (2001) (Appendix 5.A.). On October 29, 2001, the Supreme Court ordered the circuit court to appoint counsel for Defendant/Appellant to file a supplemental brief addressing whether the principles of People v Finley, 431 Mich. 506; 431 NW 2d 19 (1988), apply in the circumstances of this case (Appendix 9.A.). On March 26, 2002, Defendant/Appellant filed a supplemental brief in support of his delayed application for leave to appeal. On December 26, 2002, the Supreme Court granted Defendant/Appellant's delayed application for leave to appeal (Appendix 10.A.).

## STATEMENT OF QUESTION PRESENTED

**Whether the procedural rules adopted in People v Finley apply to appeals based on claims of error involving an erroneous pre-trial ruling allowing into evidence a defendant's assertion of his Fifth Amendment right against self-incrimination.**

Defendant/Appellant states:	No
Plaintiff/Appellee:	Yes
The Court of Appeals impliedly answers:	No

## **STATEMENT OF FACTS AND PROCEEDINGS**

### **A. Factual Statement**

Defendant/Appellant was charged with one (1) count of criminal sexual conduct in the first degree [MCL 750.520b]. He denied the allegations and elected a jury trial.

The record in this case is voluminous, containing over seven hundred (700) pages in five (5) volumes of transcripts. Because the issue on appeal for which the delayed application for leave to appeal was granted is a narrow one (i.e. "...addressing whether the principles of People v Finley, 431 Mich 506; 431 NW 2d 19 (1988), apply in the circumstances of this case" see Appendix 9.A.), this factual statement and the Appendix focus on those portions of the transcript relevant to that issue.

Prior to trial, defense counsel made an oral motion *in limine* requesting the suppression of that part of a post-arrest, post-Miranda statement made by Defendant/Appellant wherein he stated "I am taking the fifth on that one." (Appendix 14.A.) The prosecutor argued for the admission of the entire statement including Defendant's assertion of his Fifth Amendment rights. (Appendix 14.A.–16.A.) The trial court agreed with the prosecution, denying Defendant/Appellant's motion to suppress. (Appendix 16.A.-19.A.).

At trial, the complainant, a 13-year-old female, testified she was forcibly raped by Defendant/Appellant at the Defendant/Appellant's apartment. (Appendix 39.A.–50.A.) There were no other witnesses to the alleged crime. (Appendix 42.A.-43.A.) The medical testimony regarding physical evidence of the alleged rape was inconclusive. (Appendix, 23.A.–38.A.) Mary Chaney, a friend of the complainant, testified that the

complainant told her she had been raped by Defendant/Appellant immediately after the incident. (Appendix 51.A.-52.A.)

Defendant/Appellant's brother testified that he was at the apartment or with the Defendant/Appellant at the time of the alleged crime and that no rape occurred. (Appendix, 56.A. – 63.A.) Defendant/Appellant did not testify at trial.

After forty (40) minutes of deliberation the jury returned a verdict of guilty of criminal sexual conduct in the second degree [MCL 750.520c]. (Appendix 64.A.) Defendant/Appellant was sentenced to ten (10) to fifteen (15) years imprisonment. (unavailable)

#### B. Proceedings

This matter is before the Court on Defendant/Appellant's Delayed Application for Leave to Appeal from the December 15, 2000, decision of the Court of Appeals upholding Defendant/Appellant's conviction. (Appendix 7.A.) A decision on Defendant/Appellant's application was held in abeyance pending this Court's decision in People v Dennis, *supra*. (Appendix 9.A.) Following the release of the Dennis opinion, this Court ordered the filing of a supplemental brief "addressing whether the principles of People v Finley, 431 Mich 506 (1988), should apply in the circumstances of this case." (Appendix 9.A.)

Defendant/Appellant timely filed his supplemental brief in support of delayed application for leave to appeal. On December 26, 2002, this Court entered its Order granting said application. (Appendix 10.A.)

Defendant/Appellant now files its brief on appeal addressing the issue raised by the Court in its October 29, 2001, Order.



## **ARGUMENT**

**The procedural rules adopted in People v Finley  
do not apply in the instant case.**

### **Summary of Argument**

People v Finley, 431 Mich 506 (1988), relying on the Federal rule set forth in Luce v United States, 469 U.S. 38; 105 S. Ct. 460; 83 L. Ed. 2d 443 (1984), adopted a procedural rule that requires a defendant to take the stand at trial in order to preserve for appeal a claim of error involving a pre-trial ruling allowing the prosecution to use a prior conviction for impeachment purposes. To the extent that Finley actually precludes consideration on appeal of error that contributes to a miscarriage of justice, the rule should be rejected. The United States Supreme Court has allowed review of trial court evidentiary rulings that involve constitutional challenges and operated to dissuade defendants from testifying. (New Jersey v Portash, 440 U.S. 450; 99 S. Ct. 1292; 59 L. Ed. 2d 501 (1979); Brooks v Tennessee, 406 U.S. 605; 92 S. Ct. 1891; 32 L. Ed. 2d 358 (1972). Defendant/Appellant has raised such an issue. People v Finley, *supra*, does not govern the facts in the instant case.

The main justification for the Luce/Finley rule precluding review of erroneous evidentiary decisions on the use of prior convictions was that the balancing of interests necessary to rule on the admissibility of a prior conviction can only be accomplished if the defendant testifies at trial. No such balancing test is required when ruling on the admission of a defendant's invocation of his right to remain silent. That statement should never be allowed in evidence. It makes no sense to apply the Luce/Finley rule to the case at bar.

The state may not impose a penalty on an accused for exercising a constitutional privilege. Griffin v California, 380 U.S. 609 614; 85 S.Ct. 1229; 14 L.Ed. 2<sup>nd</sup> 106, (1965). An accused has a constitutional right to testify at trial. Faretta v California, 422 U.S. 806, 819 n.15(1975) The trial court's erroneous ruling in the instant case chilled Defendant/Appellant's exercise of that right because of the fear that the prosecution would elicit from him his invocation of the Fifth Amendment while under police questioning.

The very statute and court rules cited by the prosecution in its brief in response to Defendant/Appellant's delayed application for leave to appeal, MCR 2.613(A), MCL 769.26 and MRE 103(a), all require a close examination of the impact an evidentiary ruling has on the entire trial to make sure a "miscarriage of justice" does not occur. The review of the issue by the Court of Appeals in this case and this Court's decision in People v Dennis, *supra*, are consistent with People v Carines, 460 Mich 750; 597 NW 2d 130 (1999) and with the long-established jurisprudence in this State. Both decisions included an express determination that the error was harmless beyond a reasonable doubt. The fact that the Defendant/Appellant did not testify and his statement was not used by the prosecution are factors to be considered on appeal when addressing whether the error is harmless; as is the impact of the erroneous evidentiary ruling on the Defendant/Appellant's decision not to testify. The claim of error, however, is preserved whether or not the Defendant testifies.

Expansion of the Luce/Finley rule to every situation where the trial court makes a preliminary evidentiary ruling would provide the State with numerous opportunities to silence defendants, thereby defeating the very purpose of motions *in*

*limine*. State v Lamb, 84 N.C. App. 569, 583; 353 S.E.2d 857, 865 (1987), *aff'd* 321 N.C. 633, 365 S.E.2d 600 (1988); State v Brings Plenty, 459 N.W.2d 390 at 394-395 (1990); State v Brunelle, 148 Vt. 347 at 353-356; 535 A.2d 198 (1987) Moreover, the Luce/Finley rule impermissibly infringes on the accused's fundamental right to decide whether or not to testify. Brooks v Tennessee, *supra*; Apodaca v People, 712 P. 2d 467 (Colo. 1985) Such an expansion of Luce/Finley is unnecessary, contrary to Federal and State precedent and unwise.

The Luce/Finley rule is subject to criticism because it precludes consideration on appeal of an erroneous evidentiary ruling regarding the admission of prior convictions, even in instances where the ruling, either alone or coupled with other error, serves to deprive the accused of a fair trial. Such a rule runs afoul of MCL 769.26, MCR 2.613(A) and MRE 103(a) which require the court, when reviewing claims of error based on evidentiary rulings, to reverse a conviction only where there is a "miscarriage of justice" or "a substantial right of a party is affected." Extension of the rule to erroneous evidentiary rulings impacting on a constitutional right requires a radical and needless departure from current trial and appellate practice. There is no good reason to apply the Finley rule in the instant case.

Even if this Court should decide to expand the Finley rule to govern evidentiary rulings other on issues other than the admissibility of prior convictions, that decision must be prospective and should not be applied in the instant case. People v Nixon, 421 Mich 79; 364 N.W. 2d 593 (1984).

## **ISSUE PRESERVATION/STANDARD OF REVIEW**

Defendant/Appellant has preserved this issue for appeal. Defendant/Appellant raised the issue at the trial level via an oral motion to suppress, correctly arguing that the admission of his statement at trial would violate his constitutional right to remain silent in the face of questioning by the police. (Appendix 14.A.) The trial court denied the motion finding the statement did not constitute an infringement of Defendant/Appellant's right to remain silent and ruled the statement could be introduced in evidence. (Appendix, 14.A.-19.A.) This argument was repeated in Defendant/Appellant's appeal of right in the Court of Appeals. (Appendix 65.A.-71.A.) This Court ordered counsel appointed to address the issue via Defendant/Appellant's delayed application for leave to appeal and granted leave to appeal December 26, 2002. (Appendix 9.A.)

The trial court's decision to admit the challenged statement is reviewable for an abuse of discretion. The prosecution has conceded error by the trial court and the Court of Appeals concurred. (Appendix 72.A; 73.A.)

Whether a defendant's right to due process was violated is a question of law and is reviewed *de novo*. People v Connor, 209 Mich App 699, 705 (1995) Constitutional questions are reviewed *de novo*. People v White, 212 Mich App 298, 302 (1995) A preserved, constitutional error requires the beneficiary of the error (the Prosecution in this case) to establish the error is harmless beyond a reasonable doubt. People v Anderson, 446 Mich 392; 521 N.W.2d 538 (1994); People v Carines, *supra* at 774. If the Court finds that the error in this case does not rise to constitutional dimensions because there was no denial of due process under the circumstances, the burden falls

on the Defendant/Appellant to establish a miscarriage of justice under a “more probable than not” standard. People v Lukity, 460 Mich 484; 596 N.W.2d 607 (1999); People v Carines, *supra* at 774.

**A. Neither Luce nor Finley govern the procedure for review of claims of constitutional error.**

In 1988, this Court decided to follow the federal courts by adopting the procedural rule elucidated in Luce v United States, *supra*, by requiring a defendant to testify at trial in order to preserve for review a court’s ruling allowing impeachment by prior convictions. People v Finley, *supra*. Luce specifically limited its holding to preliminary rulings “... not reaching constitutional dimensions...” and expressly differentiated its holding from those in Brooks v Tennessee, *supra* and New Jersey v Portash, *supra*, both of which dealt with Fifth Amendment challenges to state-court rulings that operated to dissuade the defendants from testifying. To date, Michigan has limited its application of the rule to claims of error based on the allowance of prior conviction evidence.

The issue raised by Defendant/Appellant in the instant case had nothing to do with the admissibility of evidence of prior convictions. Rather, Defendant/Appellant claimed on appeal that the trial court’s denial of a motion to suppress a statement invoking his Fifth Amendment rights constitutes reversible error because it imposed a penalty on the exercise of his constitutional right to testify at trial: namely, the very real risk that if he testified, the prosecutor would reveal to the jury that he declined to answer questions posed by the police during custodial interrogation.

The prosecution and the Court of Appeals agree with Defendant/Appellant that the trial court’s ruling allowing the statement to be introduced was erroneous.

(Appendix 72.A., 73.A.; 7.A.)The Court of Appeals, citing People v Finley, *supra*, adopted the prosecution's argument that reversal was not warranted "...because defendant did not testify and the evidence was not admitted." (Appendix 7.A.) Notably, the Court of Appeals further held "...in light of the overwhelming evidence of defendant's guilt, any error was harmless beyond a reasonable doubt. People v Carines, cite omitted. (Appendix 7.A.) That holding is a far cry from application of the Finley rule which precludes review of a pre-trial evidentiary ruling where the defendant chooses not to testify at trial.

The Court of Appeals, by applying the "harmless beyond a reasonable doubt" standard of review in the instant case, correctly recognized that the Luce/Finley rule was never intended to limit appeals of erroneous evidentiary rulings that impact on constitutional rights.

**B. The trial court's erroneous ruling penalized Defendant/Appellant for testifying**

An accused has a constitutional right to testify at trial. Faretta v California, *supra* at 819 n.15; Harris v New York, 401 U.S. 222, 225; 91 S.Ct. 643; 28 L.Ed. 2d 1 (1971); Brooks v Tennessee, *supra* at 612; cf. Ferguson v Georgia, 365 U.S. 570 (1961)..." An accused has a constitutional right not to testify at trial. U.S. Constitution, 5<sup>th</sup> and 14<sup>th</sup> Amendments; Michigan Constitution, Article 1, §17. The prosecution's use, for impeachment purposes, of a defendant's post-arrest and post-Miranda silence violates the Due Process Clause of the Fourteenth Amendment. Doyle v Ohio, 426 U.S. 610 (1976); People v Bobo, 390 Mich 355; 212 NW 2d 190 (1973). The State's imposition of a penalty upon an accused for exercising her right to testify at trial may constitute a due process violation.

In Brooks v Tennessee, *supra*, the Supreme Court found that any rule that imposes a limitation on a defendant's freedom to decide whether to testify at trial may constitute a violation of an accused's due process rights imposed on the States by the Fourteenth Amendment. In Brooks, the statute being challenged required a defendant to testify first in presenting his defense or to relinquish his right to testify at all. Quoting from that decision:

"Whether the defendant is to testify is an important tactical decision as well as a matter of constitutional right . . . . Petitioner, then, was deprived of his constitutional rights when the trial court excluded him from the stand for failing to testify first." Brooks, *supra* at 612-613

"The dissenting opinions suggest that there can be no violation of the right against self-incrimination in this case because Brooks never took the stand. But the Tennessee rule imposed a penalty for petitioner's initial silence, and that penalty constitutes the infringement of the right." Brooks, *supra* at 611 (fn.6)

If this Court applies the Luce/Finley rule in this case (ie. precluding review of the evidentiary ruling) a penalty would be imposed upon Defendant/Appellant for asserting his right not to testify. Although the penalty being imposed in Brooks, not allowing the accused to testify at all, is more severe than that imposed in the instant case, both cases involve rulings impacting on an important constitutional right, the accused's decision whether to testify. A defendant should not be forced to testify at trial to raise on appeal the due process argument that an erroneous evidentiary ruling imposed an excessive penalty on an accused's decision to testify in her own defense.

In New Jersey v Portash, *supra*, the Supreme Court was faced with a claim of error on an evidentiary ruling that caused the accused to refrain from testifying at trial. The trial judge ruled the prosecution could use the defendant's testimony (given to a

grand jury under a grant of immunity) for impeachment purposes at trial. Because of that ruling, the defendant made the decision not to testify in his own defense. The Supreme Court found that there were no circumstances under which said testimony could be used because it was compelled testimony and its use, even for impeachment purposes, violates the clear proscription of the Fifth Amendment as applied to the states by the Fourteenth Amendment. The Supreme Court upheld the state appellate court decision overturning the defendant's conviction even though the defendant never testified at trial and was never impeached by his grand jury testimony.

In the instant case, because of the trial court's erroneous evidentiary ruling, Defendant/Appellant was faced with a decision: he could take the stand in his own defense and risk having the prosecution elicit from him the fact that he chose to remain silent in response to an incriminating question; or he could forego his constitutional right to testify in his own defense in order to assure that the jury was not exposed to the question and answer. As in Portash and Brooks, above, a ruling or statute that imposes a penalty on an accused for exercising a constitutional privilege must be reviewed under due process standards.<sup>1</sup> Application of the Finley rule in the instant case would penalize Defendant/Appellant for exercising his constitutional right not to testify at trial.

Because the trial court's erroneous pre-trial ruling imposed a penalty on Defendant/Appellant for exercising a constitutional right to testify, the claim of error must be reviewed under due process standards. In fact, Defendant/Appellant's claim was

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<sup>1</sup> "For comment on the refusal to testify is a remnant of the "inquisitorial system of criminal justice." Murphy v Waterfront Comm'n, 378 U.S. 52, 55, which the Fifth Amendment outlaws. It is a penalty imposed by courts for exercising a constitutional privilege. It cuts down on the privilege by making its assertion costly." Griffin v California, 380 U.S. 609, 614 (1965).



reviewed by the Court of Appeals which concluded any error was harmless beyond a reasonable doubt. People v Carines, *supra* at 774. (Appendix 7.A.)

**C. Expanding the Luce/Finley rule to preclude review of claims of constitutional error is unwise**

The logic in Luce and Finley that until the erroneous evidence is introduced there can be no error, while compelling, ignores certain realities of trial practice. In his concurring opinion in People v Finley, *supra* at 531, Justice Brickley notes:

“The lead opinion cites no authority to support this sweeping dictum, the future readings of which cannot be foreseen . . . Interlocutory appeals are regularly taken on evidentiary questions and pretrial rulings are often deemed erroneous in spite of the fact that their effect has not yet been felt at trial.”

An erroneous evidentiary ruling can have a serious impact on an accused’s decision to testify at trial as argued in section B, above. If the error involves constitutional considerations, forcing an accused to testify in order to preserve the error certainly smacks of imposing a penalty for the exercise of a constitutional privilege, a procedure violative of due process. Brooks v Tennessee, *supra* at 611; Griffin v California, *supra* at 614; Simmons v United States, 390 U.S. 377, 88 S. Ct. 967, 19 L.Ed.2d 1247 (1968).<sup>2</sup>

Nor does an appeal of right necessarily diminish the harm imposed by a rule that requires an accused to participate with the trial court and prosecutor in creating error. The right to appeal only has meaning after one has been convicted and sentenced. The

<sup>2</sup> In Simmons v United States, 390 U.S. 377, 88 S.Ct. 967, 19 L.Ed.2d 1247 (1968), the Supreme Court held that a defendant’s suppression testimony may not be admitted against him at trial as evidence of guilt because to do so would deter the defendant “from presenting the testimonial proof...necessary to assert a Fourth Amendment claim.” 390 U.S. at 394.

process is both expensive and lengthy. There is no guarantee that the appellate court will overturn the conviction. Although the constitution does not guarantee a trial free from all error, a rule that compels an accused to assist in creating error in order to preserve an issue on appeal, particularly an issue raising the violation of a constitutional right, is unwise. An accused should have the opportunity at the original trial to a record untainted by constitutional error. That is a main purpose for motions *in limine*.

As pointed out by Justice Cavanagh in his dissent in Finley, *supra* at 537-538:

“... motions in limine and offers of proof are an efficient means of avoiding trial delays regarding the admissibility of potentially inflammatory evidence, and litigants are encouraged to use them.”

This view was shared by the North Carolina Court of Appeals in State v Lamb, *supra*, which rejected the Luce rule citing the following policy consideration:

“Strong policy favors reviewability in such a case. The purpose in allowing a motion in limine is to permit a witness to testify without threat of use of inadmissible evidence. If the threatened use of inadmissible evidence can prevent the defendant from testifying altogether and also deny her the opportunity to appeal an erroneous ruling on the admissibility of the evidence, the State would have multiple illegitimate opportunities to silence defendants, and the very purpose of the motion in limine would be lost.” *id.* at 583.

Preventing an accused from presenting on appeal a due process violation because he exercised his right not to testify will have a “chilling effect” on that right. Whether that effect is incidental or intentional, it is unnecessary and therefore excessive.<sup>3</sup>

**D. Application of the Luce/Finley rule to evidentiary rulings based on constitutional claims conflicts with existing state law and procedure**

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<sup>3</sup> “The question is not whether the chilling effect is ‘incidental’ rather than intentional; the question is whether that effect is unnecessary and therefore excessive.” United States v Jackson, 390 U.S. 570 at 582-583, 88 S.Ct. 1209, 20 L.Ed.2d 138 (1968).

As argued by the prosecution in its brief opposing Defendant/Appellant's delayed application for leave to appeal, reversal of a judgment following trial is governed by statute, court rule and the rules of evidence. MCL 769.26 precludes reversal for an evidentiary error "...unless, in the opinion of the court, **after an examination of the entire cause**, it shall affirmatively appear that the error complained of has resulted in a **miscarriage of justice**" (emphasis added). MCR 2.613(A) tells the reviewing court to reverse on an erroneous evidentiary ruling where failing to reverse "...appears to the court **inconsistent with substantial justice**" (emphasis added). MRE 103(a) advises that "Error (presumably "reversible error") may not be predicated upon a ruling which admits or excludes evidence unless **a substantial right of the party is affected.**" Application of these principles of review militates against expansion of the Luce/Finley rule to the case at bar.

Luce/Finley seeks to avoid altogether the appellate review of *in limine* evidentiary rulings based on whether or not the defendant testifies. It is not the defendant's taking the stand at trial that should control the review of evidentiary rulings; rather, it is whether the ruling in question, "after an examination of the entire case" resulted in a miscarriage of justice or affected a "substantial right of a part." <sup>4</sup>

Examples of the appropriate procedural treatment of claims of constitutional error resulting from *in limine* evidentiary rulings can be found in the Court of Appeals decision in the instant case and this Court's opinion in People v Dennis, *supra*. Although the Court of Appeals cites the Finley decision in rejecting

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<sup>4</sup> For example, in the instant case, despite Defendant/Appellant's decision not to take the stand, had the prosecution or the trial judge commented on his failure to give a statement to the investigating officer, surely the issue would be preserved.

Defendant/Appellant's claim of appeal, it went on to state: "...in light of the overwhelming evidence of defendant's guilt, any error was harmless beyond a reasonable doubt." The fact that the defendant did not testify was considered along with the fact that the offending statement was not admitted in reaching the conclusion that the error was harmless.

So too in Dennis, *supra*, the majority analyzed what impact the evidence of the defendant's refusal to be questioned may have had on the trial as a whole. It concluded that no due process violation had occurred and that therefore, the trial court did not abuse its discretion in denying the defendant's motion for a mistrial. In both instances, this Court and the Court of Appeals were faithful to Michigan jurisprudence by examining the entire record to determine whether the erroneous evidentiary ruling resulted in a miscarriage of justice. The fact that the defendant did not testify in the instant case or in Dennis did not preclude review of the evidentiary error under the procedures set forth in People v. Carines, *supra*. There exists no good reason to modify that procedure.

**E. The Luce/Finley rule should not be applied in the instant case**

The purpose of the Luce/Finley rule "...is to provide a mechanism for meaningful appellate review of the impeachment decision." People v. Finley, *supra* at 512. In making the decision, the trial court must weigh the probative value of the conviction against its prejudicial effect on a defendant. In the instant case, of course, no balancing test is required because there is no circumstance where an accused's assertion of his Fifth Amendment rights or comment thereon by the State should be allowed. Doyle v. Ohio, *supra* at 617-620; People v. Bobo, *supra* at 356.

Even when dealing with impeachment by prior convictions, the Luce rule has been strongly criticized because of the negative impact such a rule has on motions *in limine*. State v Lamb, *supra* at 580, 581, was a case involving a motion to suppress evidence of the defendant's involvement in prior murders where the defendant chose not to testify: In rejecting the prosecution's argument to adopt the Luce rule, the North Carolina Court of Appeals stated:

*"United States v Kiendra*, 663 F.2d 349, 352 (1<sup>st</sup> Cir. 1981) and *United States v. Lipscomb*, 702 F.2d 1049, 1069 (D.C. Cir. 1983) both list cogent policy reasons in favor of appellate review:

First, when a defendant seeks an advance ruling on admission of a prior conviction, it is reasonable to presume that the ruling will be an important factor in his decision whether to testify. See *Kiendra*, 663 F.2d at 352. Second, advance rulings on admissibility are preferable because "counsel need to know what the ruling will be on this important matter so that they can make appropriate tactical decisions." 3 J. Weinstein & M. Berger, *Weinstein's Evidence* p. 609, at 609-682 (1981), quoted in Jackson, 627 F.2d at 1209. To limit review of advance rulings would undercut the value of such rulings. See *Kiendra*, 663 F.2d at 353-53. Third, and most important, the [contrary] rule will probably serve merely as a trap for unwary defendants or defense counsel. (footnote omitted)

In the instant case, it is reasonable to presume that Defendant/Appellant intended to testify prior to the adverse ruling or his attorney would not have sought a preliminary ruling to suppress his invocation of the right to remain silent. It can also be presumed that the prosecution intended to use the statement if Defendant/Appellant testified (or at least intended to make the Defendant/Appellant believe she would to keep him from testifying), or she would not have opposed Defendant/Appellant's motion to suppress. In either case, the harm was done. Defendant/Appellant, threatened with

the use of his invocation of his fifth amendment right to silence should he choose to testify, elected to forego testifying in his own defense and was subsequently convicted.

**F. Any application of the Luce/Finley rule to evidentiary rulings not involving the use of prior convictions must be prospective.**

Should the Court reject Defendant/Appellant's arguments above opposing the expansion of the Luce/Finley rule that a defendant must testify at trial to preserve on appeal evidentiary rulings other than the use of prior convictions for impeachment purposes, any application of the rule to evidentiary rulings impacting on constitutional rights must be applied prospectively. Applying the three factors set forth in People v Nixon, *supra* at 85, any expansion of Luce/Finley should not impact Defendant/Appellant's claim of error.

i. The purpose of the new rule

The stated purpose of requiring a defendant to testify at trial in Luce and Finley was to provide a complete record so as to assist the appellate court in deciding whether the trial court properly balanced the probative and prejudicial factors in deciding to admit the evidence. No such balancing test is required when determining the admissibility of a defendant's statement asserting her constitutional right to remain silent.

ii. The general reliance on the old rule

The "old rule" allows a defendant to raise on appeal an evidentiary issue impacting on a constitutional right by challenging the admissibility of the evidence via a motion *in limine*. The record established during the motion *in limine* is generally sufficient to enable a reviewing court to rule on the correctness of the trial court's

decision. Only if the evidentiary ruling results in a “miscarriage of justice” will the appellate court overturn the conviction. MCL 769.26.

Counsel for Defendant/Appellant relied on the “old rule” in the case at bar. This rule has served Michigan criminal jurisprudence well for over a hundred years. Neither the Court of Appeals in the instant case nor this Court in People v Dennis, *supra*, which was decided in 2001, had any trouble applying the “old rule” when affirming the convictions. The criminal bar has relied on the motion *in limine* to preserve error from time immemorial. Defendant/Appellant should not be blind-sided by a newly-crafted procedural rule.

iii. The effect on the administration of justice

If this Court were to apply the Luce/Finley rule retroactively, defendants who have relied on the current procedure and who chose not to testify to prevent the use of the improper evidence would lose their right to challenge the evidentiary ruling. Such an application could itself constitute a denial of due process since there is no existing decision describing precisely what the new rule should be. Nor would there would be any great benefit in applying a new rule to existing appeals. There can be no justification for retroactive application of the Luce/Finley rule to all evidentiary rulings, even those impacting on constitutional rights.

## CONCLUSION

The Luce/Finley rule was never intended to cover evidentiary rulings on issues with constitutional implications. Luce v United States, *supra* at 42, 43. Moreover, since 1984, the Federal courts have not seen fit to expand the rule beyond evidentiary rulings involving FRE 609(a)(1) (the use of prior convictions for impeachment purposes). Nor have the Michigan courts attempted to expand the rule first enunciated in People v Finley, *supra*, a 1988 decision.

Defendant/Appellant's decision to forego his constitutional right to testify at trial did not prevent the Court of Appeals from analyzing his conviction for harmless error in the instant case. Nor did the defendant's failure to testify prevent this Court from reviewing the claim of error asserted in People v Dennis, *supra*. Whether the evidence is actually admitted in the trial; whether the prosecution or trial court improperly commented on an invocation of the right to remain silent; whether the defendant gave up his right to testify to avoid the use of constitutionally infirm evidence; whether the defense is able to elicit the needed testimony from other witnesses; these are all factors that must be examined on appeal to determine whether a defendant has been denied a fair trial. Defendant/Appellant's right to appeal erroneous evidentiary rulings should not be conditioned upon his relinquishing his right to remain silent at trial.

In the instant case, Defendant/Appellant timely moved to suppress that part of his statement invoking his constitutional right to remain silent. The only reason to make such a motion is to ensure that if Defendant/Appellant testifies at trial, the jury will not hear that he chose not to answer an incriminating question by the police. The prosecutor inexplicably argued for its use. The trial court even more inexplicably



allowed the prosecution to elicit the entire statement. Although the record is unclear as to how the prosecution intended to use the statement, no limitation was placed on its use by the trial court. (Appendix 19.A.) The fact that the prosecution argued for its use had the effect of chilling Defendant/Appellant's constitutional right to take the stand in his own defense. It is this error that requires reversal and the granting of a new trial.

**RELIEF**

The trial court's decision to allow the prosecution to introduce into evidence Defendant/Appellant's assertion of his Fifth Amendment right to silence constituted an impermissible "penalty" on the exercise of his right to testify, thus depriving him of due process under the Fourteenth Amendment of the United States Constitution and Article 1 §17 of the Michigan Constitution. Defendant/Appellant requests that his conviction be set aside and he be granted a new trial.

Respectfully submitted,

CAPUTO BROSINAN P.C.

Dated: February 18, 2003.

By:

  
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